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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 970

NEETA WEBB,

Petitioner

versus

ROBERT E. NOLAN, M. D.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI

Neeta Webb
Acting as Her Own Attorney

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IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1969

No. _____

NEETA WEBB,
Petitioner

versus

ROBERT E. NOLAN, M. D.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI

NEETA WEBB, Plaintiff in the United States District Court for The Middle District of North Carolina, at Winston-Salem, and Appellant in the Fourth Circuit Court of Appeals, prays that a Writ of Certiorari issue to review the judgement of the District Court entered in the case above on the twenty-first day of April, 1969, and appeal denied by the Fourth Circuit on the fourteenth day of July, 1969.

OPINIONS BE_OW.

The opinion of the District Court for the Middle District of North Carolina at Winston Salem is not reported.

The opinion of the Appellate Court for the Fourth Circuit is not reported.

The District Court ruled that plaintiff could not have a jury trial because she was representing herself and because her former lawyer did not file timely demand.

The Fourth Circuit Court ruled that the order of the District Court was an interlocutory one and not appealable under 1292 (b) and also stated that plaintiff did not oppose a Motion to Dismiss;

Copies of these conclusions are attached to this application.

Appendix A Memorandum of District Court

Appendix B Decision of Fourth Circuit

JURISDICTION.

This suit was brought under diversity of citizenship to recover damages that plaintiff below (Appellant here) suffered as a result of surgery performed by defendant below (Appellee here).

At the final pre-trial conference the plaintiff's petition for a jury trial was denied. The denial was dated April 21, 1969. Notice of Appeal was filed in that Court on May 15, 1969.

The Fourth Circuit ruled that the order of the District Court was interlocutory and also stated that plaintiff made no objection to defendant's Motion to Dismiss. The decision was

dated July 14, 1969.

Copies of these decisions are appended to this petition in the Appendix at p. 36 and p. 41.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

ADDITIONAL GROUNDS OF JURISDICTION

The petitioner also contends that the judgments are founded on other errors, which though they involve questions not subject to review by this Court on appeal, nevertheless deprive the appellant to a fair hearing and constitute a denial of due process of law and denial of the equal protection of the laws.

These errors are included in the statement of the questions presented by this petition, hereinafter set forth.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the district court erred in denying plaintiff's request for a jury trial because she was acting as her own attorney and because her former lawyer did not file timely demand for a jury trial.

2. Whether the appellate court erred in considering defendant's Motion to Dismiss plaintiff's appeal to the circuit court when the defendant had not objected to plaintiff's request at the time she made it in the district court.

3. Whether the appellate court erred in stating that plaintiff made no objection to defendant's Motion to Dismiss.

STATUTES INVOLVED

Fed. Rule 38 (a) states

> that the right of trial by jury as declared by the Seventh Amendment, or as given by a federal statute "shall be preserved to the parties inviolate"

SEVENTH AMENDMENT provides:

> In suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The petitioner suffered partial facial paralysis immediately after surgery was performed by respondent. She, a resident of California, brought an action in Federal Court, based on

diversity of citizenship, because respondent is a resident of North Carolina, and because the amount involved is more than $10,000.00.

Her complaint was filed by Lawyer Raymond Alexander, after plaintiff paid him. Thereafter appellant was unable to get the lawyer to go forward with the case. He refused to do additional work unless he was paid more money, although plaintiff had paid the full amount called for in the contract.

He did not demand a jury trial as he had said he would. However, later he filed a petition for a jury trial, but he did not keep his promise to plaintiff, that he would explain to the court that the omission was entirely his own neglect. It was not until after he was dismissed that petitioner knew the contents of certain papers filed in the case.

The plaintiff thereafter assumed the tasks related to trying her own case. Shortly after dismissing Lawyer Alexander she filed papers requesting a jury trial.

At the final pre-trial conference the plaintiff gave her reasons for seeking a jury trial. This is a part of the Record, ("Narrative Summary of Pre-trial Conference").

The defendant made no objection to plaintiff's request.

The judgement or memorandum dated April 21, 1969, by Judge Eugene E. Gordon is attached, Appendix A.

Thereafter on May 15, 1969, plaintiff filed notice of appeal. The decision of the Appellate Court dated July 14, 1969, is attached, Appendix B.

While she was preparing a brief to submit to the appellate court in connection with her appeal the defendant filed a Motion to Dismiss. This although he had made no comment at the time of the plaintiff's request for a jury trial.

REASONS FOR GRANTING THE WRIT

The issues in this appeal are important to the citizens of our country because a basic right is involved.

The court should consider that this is a malpractice case. Contentions of the plaintiff are that the defendant was negligent, that surgery was performed without informed consent, and that she suffers partial permanent facial paralysis. She has submitted a long list of instances (Pre-trial Order) of gross carelessness on the part of the defendant. Her witnesses will testify

regarding her limitations. She will enumerate her losses. These are facts and such are for a jury.

At the opening of the court the court granted the motion for a jury and an exception was taken. Whether the court should have granted the motion was within its own discretion (Rule 39 (b) Federal Rules of Civil Procedure) and there was no abuse of discretion since an action for damages for personal injuries is peculiarly one to be decided by a jury. Federal Rules of Civil Procedure. Rule 38, 39 (b) 28 U. S. C. A. S. S. Kresge v. Holland 158 F. 2d 495

It is always understood that if the basic issues are ones which historically are for the jury a jury request should be respected.

It is the kind of question that must be left to the jury. It involves looking back and judging what would have been the likely behavior of the patient if she had been told of the danger.

No expert evidence would seem to be particularly helpful here. Thus this phase of the case, while it is perhaps a speculative one, nonetheless involves a problem of the type that our judicial system has long left to the jury. I for one can suggest no good reason upon which that should be changed. Medical Malpractice E. Donald Shapiro, p. 41

The lawyer who filed plaintiff's complaint understood that the case was to be presented to a jury. He failed to demand jury trial in the beginning, but later took steps to correct this

(Record. Motion for Jury Trial). However, he did not himself explain to the court that the omission was his fault.

Various situations have been held to constitute a sufficient excuse for failing to demand a jury. Inadvertance on the part of the lawyer is cited in a number of cases where delayed request was granted.

The fact that Rule 6 b (2) permits the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect, further indicates that in the adoption and promulgation of the New Rules the Supreme Court intended that the rigid provisions of Rule 38 b might be relaxed upon proper showing, in the discretion of the court, and it appears to be the intent and practice to construe the provisions

of the Rules to render substantial justice....

....it does not appear that the defendant has suffered, or will suffer, any prejudice or the loss of any substantive right and the court should not be prone to deprive a litigant of a trial by jury because of an error or omission on the part of the agent of her attorney to whom she has entrusted her case, where the act or omission is excusable. Hargreaves v. Roxy Theatre, Inc. 4 F. R. S. 39 b 2, Case 3

At no time has plaintiff indicated that she would be willing to have the case tried by a judge. Shortly after she began to handle the case herself she took steps to get a jury trial (Record, Petition for Jury Trial).

Every reasonable presumption will be indulged against waiver of fundamental rights to

jury trial.

As respects waiver of right to jury trial, a waiver of necessity must be an intentional act. Burke Grain Co. v. St. Paul Mercury Indemnity Co. 94 F. 2d 450

In Corpus Juris V. 50 p. 805 "A trial by jury is not waived by the failure to demand a jury where there is a sufficient excuse for the failure."

In this case it was the definite intention of the plaintiff to have a jury trial. Surely the circumstances shown in the record are such as would warrant granting of a basic right. Constitutional guarantees should not be denied to one who did all that was correct in connection with making timely application for a jury trial.

The defendant will not be harmed by having a

trial by jury. At the hearing on plaintiff's petition for a jury trial he listened to all eighteen reasons (Record, "Narrative Summary") given by plaintiff for wanting a jury trial. He made no objection to any of her remarks. He voiced no opposition. There was nothing to indicate that he might want for himself anything different. He said nothing.

Plaintiff had filed her request for a jury trial; the defendant asked for a hearing on the matter. He got it. The defendant heard the plaintiff. He himself elected not to be heard, (Memorandum, Final Pre-Trial Conference). Appendix A

At that same hearing defendant made known he had changed his mind about one of his requests.

The defendant has said nothing that would indicate any violation of his rights. If defendant

felt he would in any manner be prejudiced he has had a chance to so state.

Failure to demand jury trial in accordance with court rules does not deprive party of right of trial by jury unless to grant right would operate to prejudice of his adversary.

Barrett v. Sterrett Operating Service

No. 6695 192 87 F. 2d 224

The decision of the district court was prejudicial to petitioner and irrepairable damage will be done if her case is tried by a judge who has already stated that he does 'not want to try the case'. Thus there have been and are no compelling reasons to deny jury trial. Decisions are to be made so as to be most favorable to the plaintiff.

It is within the discretion of the court to allow

a trial by jury when circumstances justify it. All the events and all the statements in this case lead to reasons for granting plaintiff's request.

Plaintiff has been puzzled by many of the statements of the district court.

At the hearing on her petition for a jury trial she referred to the times that the judge had ruled in favor of the defendant (Record,"Narrative Summary", Plaintiff's reason No. 8.)

The judge's stating (Appendix A) that plaintiff would not know what could be presented to a jury in a malpractice case is no reason to deny jury trial. In the unlikely event that plaintiff should erroneously include that which would be out of order, the defendant would have the right to object.

A citizen should be free to choose whether she tries a case herself. There should be no pressure by any judge.

The judge's statement was clear: "This is a case that I do not want to try." Surely plaintiff has a right to go before a group that is without pre-conceived ideas. She has a right to inquire beforehand regarding this.

> "Notwithstanding the failure of a party to demand a jury in an action in which a demand might have been made of right, the court in its discretion, upon motion, may order a trial by jury of any and all issues."

Harsh, if not unconscionable results will be produced in this case if plaintiff does not have a jury to judge the facts.

"The court in exercising its discretion under Rule 39 (b) should grant a jury trial in the

absence of strong and compelling reasons to the contrary." There is nothing in this case that favors a denial of plaintiff's petition.

"Where a party is deprived of a basic right it is not only error but is also an abuse of discretion."

The court, in the exercise of its power to grant a jury trial after the parties have foregone their right to demand one, may consider and act upon pertinent factors, including particularly notice of the issues presented by pleadings and general orderly disposition of court's business. Kass v. Baskin No. 9393 164 F. 2d 513

We are of the further opinion, however, that if upon remand the discretion of the court is invoked Under Rule 39 (b) by a timely

motion for a jury trial, the court may, and in the absence of strong and compelling reasons to the contrary, should grant the motion. Albert v. R. P. Farnsworth 176 F. 2d 198

Although the fines imposed by a state court judgement are small, the Supreme Court of the United States will grant certiorari to review the judgement when the due process questions are substantial. Thompson v. City of Louisville 362 U.S. 199

The Constitution values the right to a jury trial above that of a district court judge penalizing a plaintiff for the omissions of her former lawyer.

Observance of reasonable rules for conduct of business of the Courts is not a mere technicality, but may be part of the major

business of preserving the basic rights of people who must come to the courts. D. C. Code 1940 11-715

"If one deserving, complies with spirit but not with letter, it is not abuse to grant the request."

It is clearly shown that petitioner intended to have a jury trial as a matter of right. The circumstances reveal that plaintiff has complied with the spirit of the law. Petitioner should not be penalized because a lawyer whom she had paid failed to act according to her specifications.

It has been said that laws can be applied in such a way that either party may win. Likewise it is understood that the letter of the rule is not to be followed if injustice will result. So this is true when the outcome would mean undue hardship,

or when it would mean a defeat of an appeal.

Plaintiff sincerely believes that the interest of justice and fair play suggest the Supreme Court should exercise its inherent power and discretion in permitting that which is the spirit of the law and should give plaintiff the opportunity she expected from the beginning.

Petitioner's case is entitled to have applied to it that which reflects the spirit of the law. "The purpose of the Federal Rule was to eliminate complaints as to technicalities of law, the sublities of practice and the involvement of procedure."

The Seventh Amendment right to a jury trial in a federal court is basic and fundamental, but once this right has been waived, the court has, under Rule 39 (b) broad discretion in relieving a party, or parties, from such

waiver.

It is not the spirit of the rules, particularly the rules as amended and adopted subsequent to filing of this motion, to base the right to a jury trial on technical adherence to the time requirement for demanding. State of Mississippi for Richmond v. Hurst 41 F. R. D. 186

A trial by jury is a constitutional right granted to every litigant in a federal court.

The Seventh Amendment to the Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States,

than according to the rules of the common law."

Rule 38 (a) states that the right of trial by jury as declared by the Seventh Amendment, or as given by a federal statute "shall be preserved to the parties inviolate."

Despite the critics, there is still a general professional view that maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history in jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with utmost care. The Supreme Court has been zealous to safeguard, perhaps even to enlarge, the function of the jury. Federal Courts, Wright p. 350

... for Congress not only has explicit

constitutional authority to provide a jury trial in common law cases but indeed is prohibited from denying such a trial. Federal Courts, Wright p. 351

Dairy Queen has surely not answered all the questions suggested by Beacon Theatres. It has answered some of them, and its renewed emphasis on the fact that the procedural innovations of the rules have made traditional equitable remedies unnecessary in many cases strengthens the impression that the Court does, in fact, intend to require a substantial expansion of jury trial in areas where heretofore a jury has been thought unnecessary. Federal Courts, Wright p. 355

Thus one court boasts that "it has been the unbending practice of this Court for many years not to order a jury trial once it has

been waived." Such decisions put the empasis in the wrong place. Technical insistence upon imposing a penalty for inadvertance by denying a jury trial is not the spirit of the rules. If the issue is one which normally should be tried by a jury, the court should grant relief from waiver in the absence of compelling reasons to the contrary. Federal Courts, Wright p. 356

The denial of a request for a jury trial is immediately appealable.

Nevertheless it is not feasible to bar all appeals save from final decisions. In some cases important rights of a party will be irremediably destroyed if he is unable to secure prompt review, and in others an issue is so readily separable from the balance of the case

that there is no advantage in postponing review of that issue, and thus holding in abeyance the trial court's resolution of it until the remainder of the case has been decided. For these reasons there are certain statutory provisions ... permitting review of interlocutory orders, and there are a variety of court-made rules by which particular orders are treated as "final" and appealable as such. Federal Courts, Wright p. 395

Full use of interlocutory appeal may be allowed where there is a controlling question of law and an immediate appeal may materially advance the ultimate termination of the litigation. 28 U. S. C. A. 1292 (b) Tokio Marine and Fire v. Aetna 322 F. 2d 113, 1953

The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Napue v. Illinois # 19599 360 U. S. 264

Generalizing from these various situations in which the courts have treated as "final" an order which is not a complete disposition of the case, the Fifth Circuit has recently said that "an order, otherwise non-appealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgement may be appealed immediately under Section 1291". Though the Supreme Court has never said as much in terms, its decisions do point in such a direction. Federal Courts, Wright p. 399

It has been said that in the absence of a statute logic will prevail. In this case, even if there were no statutes, no precedents, reason should be applied. Here is presented the petitioner's desire for a jury trial, her lack of fault regarding seeking it, the judge's statements in regard to his not wanting to try the case, and a silent defendant.

Why not permit petitioner to have her request for a basic right when she has so many reasons for wanting it, and at the hearing defendant did not speak to oppose it?

There is law regarding that which is here presented. It is law regarding a jury trial. As in many other cases, this subject is discussed in Paper Stylist, Inc.

Mistake, error, omission, or inadvertance should be corrected in instances when and where reasonable explanations are presented and where important rights may be destroyed.

...I am also compelled to this conclusion by the importance of the right to seek a trial by jury. Blackstone said that trial by jury is the glory of the law. It is my thought that the right to seek the glory should not be hampered by unreasonable obstacles.

But as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver. Paper Stylist Inc v. Fitchburg 9 F. R. D. 4

The procedure followed by the district court in this case is not only clearly contrary to the

Constitution but is contrary to public interest.

It is important that lower courts pursue a course that reassures society that there will be no abusing of a Constitutional right. Likewise there is a need to reflect society's strong feelings regarding the opportunity which each individual has in pursuing his interests and his rights. More is involved here than the right of a party litigant. The public has an important stake.

Other courts have ruled that a petition for a jury trial shall be granted despite the fact that demand was not made within a certain time limit.

There is no question but that there is a conflict of authority as to the exercise of the discretion of the court as empowered by Rule 39 (b). However, it is my considered

judgement that the plaintiff presents an intelligent, reasonable excuse for its failure to comply with the rule as to timely demand. Mistake, error, omission or inadvertence should be corrected in instances where reasonable explanations are presented and where important rights may be destroyed. Paper Stylist Inc. v. Fitchburg Paper Co. No. 3026 9 F. R. D. 4

Such denial as that in petitioner's case calls for the scrutiny of the Supreme Court.

If a district judge can link a litigant's trying a case for herself with the neglect of a lawyer and thus deny a jury trial, basic rights of our citizens are threatened.

CONCLUSION.

Serious questions are here raised in regard

to the rights of an individual that call for a resolution by this court. It is a novel question regarding constitutional interpretation not heretofore decided by this court.

It is submitted that the decision of the district court fails to recognize the importance of individuality by denying a citizen of the United States the right to a jury trial because she is appearing in her own behalf.

The question as to the denial of a petition for a jury trial is important. A wrong decision should not be allowed to stand because of the consequences to others. This is an age of righting wrongs and of the pursuit of individuality.

A hearing on this denial would serve a noteworthy purpose.

Petitioner respectfully suggests that the court find her case an appropriate one for a hearing.

Respectfully submitted,

Neeta Webb

PROOF OF SERVICE

I, Neeta Webb, petitioner in this case, depose and say that on the _____ day of December, 1969, I served a copy of the foregoing Petition for a Writ of Certiorari on the defendant, appellee herein, by mailing a copy in a duly addressed envelope, with air mail postage pre-paid to Lawyer Ralph M. Stockton, Jr., P. O. Box 2860, Winston-Salem, North Carolina, counsel of record for Robert E. Nolan, M. D.

_____

Subscribed and sworn to before me, at _____ this the _____ day of December, 1969.

_____

In The United States District Court
For The Middle District Of North Carolina
Winston-Salem Division

NEETA WEBB,	)	
	)	
Plaintiff,	)	Case No.
	)	
vs.	)	C-179-WS-67
	)	
ROBERT E. NOLAN, M. D.,	)	
	)	
Defendant	)	

MEMORANDUM

This matter was scheduled for Final Pre-Trial Conference and Motion hearing in the United States Courtroom, Post Office building, Winston-Salem, North Carolina, April 11, 1969. Miss Neeta Webb, Plaintiff, appeared Pro Se; Ralph M. Stockton, Jr., Esquire, and J. Robert Elster, Esquire, appeared as Counsel for the Defendant.

In addition to the Final Pre-Trial Conference, the Motion of the Plaintiff for trial by jury was

heard and considered. The Motion for trial by jury is denied. The demand was not made within the time prescribed by Rule 39 of Federal Rules of Civil Procedure. Further, inasmuch as the Plaintiff is not represented by Counsel in this involved and complicated suit, it is the opinion of the Court that it would be difficult, if not impossible, to try the case fairly before a jury. Counsel for the Defendant will accordingly prepare an Order for the signature of the Court. The attention of the Court was called to the fact that there is a Motion pending for a physical examination of Plaintiff prior to the trial.

Counsel advised that they were not sure they wanted the physical examination performed, but that they would like the matter left open for consideration later.

The parties presented to the Court a proposed Order on Final Pre-Trial Conference, which had been signed by Counsel for the Defendant and by the Plaintiff. The Order was approved and ORDERED filed in the form submitted.

Prior to fifteen days of the date of trial, Counsel for the Defendant will file with the Court a trial brief; the Plaintiff may, but is not required to file a trial brief; and if the Plaintiff desires to file a trial brief, she may file it at any time prior to or during the course of the trial. Of course, at the time of filing the trial brief or briefs with the Court, copies will be mailed to the opposing party or counsel.

The Plaintiff called the attention of the Court to the fact that she only recently had come to know that there was some contention

by the Defendant about facial paralysis, and that she felt that she should have an opportunity to rebut evidence of the Defendant in this respect. Therefore, the Plaintiff may, if done within ten days of this date, give the names of three witnesses, including addresses and a resume of the testimony proposed, to Counsel for the Defendant, with copies to the office of the Clerk of Court; which witnesses are to testify about facial paralysis. The Order on Final Pre-Trial shall be automatically amended to include these three witnesses for the Plaintiff.

The Court stated to the Plaintiff and Counsel for the Defendant that in view of the proposed three witnesses, Counsel for the Defendant would be allowed, in the event they deemed it in the interest of their client, to submit interrogatories or take a deposition of these witnesses, but that such must be done within forty-

five days after receiving the names of the witnesses.

I, Graham Erlacher, Official Reporter of the United States District Court for the Middle District of North Carolina, do hereby certify that the foregoing is a true transcript from my notes of the entries made in the above-entitled Case No C-179-WS-67, before and by Judge Eugene A. Gordon, on April 11, 1969, in Winston-Salem, North Carolina, and I do hereby further certify that a copy of this transcript was mailed to each of the below named attorneys on April 21, 1969.

Given under my hand this 21st day of April, 1969

Graham Erlacher
Official Reporter

cc: Miss Neeta Webb
Ralph M. Stockton, Jr., Esq.
J. Robert Elster, Esq.
James J. Booker, Esq.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13, 698

Neeta Webb, Appellant,

versus

Robert E. Nolan, M. D., Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem.

Upon consideration of the Motion to Dismiss this appeal, in the absence of any opposition on the part of the appellant, and it appearing to the Court that the attempted appeal is from an interlocutory order denying a jury trial in a civil case, there having been no request for a jury within the time permitted by the Rules, the order being entirely interlocutory and not appealable under the provisions of 28 U. S. C. 1292 (b).

Now, therefore, it is ordered that the appeal be, and it is hereby is, dismissed.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Filed
July 14, 1969
Samuel W. Phillips
Clerk

A true Copy, t e s t e:
Samuel W. Phillips,
Clerk
By Margaret P. Atkins,
Deputy Clerk

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NEETA WEBB,

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Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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NEETA WEBB,

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ROBERT E. NOLAN, M.D.,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

The respondent, Robert E. Nolan, respectfully submits to the Court that the plaintiff's petition for a Writ of Certiorari to obtain review by the Supreme Court of an interlocutory order denying plaintiff's request for a jury trial in a civil case, where no request for jury trial had been made within the time permitted by Rule 38 of the Federal Rules of Civil Procedure, is frivolous, without merit, and should be denied.

STATEMENT OF FACTS

The following facts appear of record:

1. The plaintiff instituted this medical malpractice action on August 31, 1967, by the filing of a Complaint signed

by the attorney then representing her. The Complaint did not demand a jury trial.

2. The defendant filed Answer and Counterclaim. The defendant did not request a jury trial.

3. An initial pre-trial conference was held in this case on December 14, 1967, which conference was attended by counsel then representing the plaintiff. A written memorandum of said initial pre-trial conference, signed by the Honorable Eugene A. Gordon, United States District Judge, was entered on December 15, 1967, which written memorandum appears of record. Paragraph 10 of said memorandum recites "a trial by jury has not been demanded within the time provided by the Federal Rules of Civil Procedure, and it is ordered that the case be placed on the non-jury docket."

4. On January 16, 1968, a motion was filed by counsel then representing plaintiff reciting that no demand for jury trial had been made within the time permitted by the Federal Rules of Civil Procedure, and praying that the Court in its discretion enter an order allowing a jury trial.

5. The defendant filed a written response opposing said motion for a discretionary order allowing jury trial.

6. On April 12, 1968, the plaintiff and the counsel then representing her filed a joint motion seeking an order to allow counsel then representing plaintiff to withdraw from the case. Said motion specifically referred to the fact that a motion for jury trial was pending; and said order was signed by the plaintiff herself in addition to being signed by the counsel then representing her.

7. On July 22, 1968, a consent order was entered by the District Judge granting the plaintiff an extension of the discovery to permit her to retain new counsel; and plaintiff did thereafter retain new counsel.

8. On November 1, 1968, an order was entered by the District Judge allowing plaintiff's second counsel to withdraw from the case. Since that time plaintiff has been representing herself.

9. On December 21, 1968, plaintiff filed a petition for a discretionary order allowing trial by jury.

10. On December 30, 1968, the defendant, through counsel, filed a response opposing plaintiff's petition for jury trial.

11. A final pre-trial conference was held in this case on April 11, 1969, before the Honorable Eugene A. Gordon, United States District Judge. At that time plaintiff argued her motion for a discretionary order permitting trial by jury. The trial judge, in his discretion, denied plaintiff's motion; and on April 17, 1969, entered an order denying the plaintiff's motion for jury trial. (Order printed in Appendix to this brief.)

12. The plaintiff thereafter filed a "Notice of Appeal" from said interlocutory order to the United States Court of Appeals for the *Second* Circuit. Said "Notice of Appeal" was amended by the plaintiff on June 23, 1969, to direct said "Notice of Appeal" to the Court of Appeals for the *Fourth* Circuit.

13. On June 24, 1969, the defendant filed a "Motion to Dismiss Plaintiff's Purported Appeal," and supporting brief.

14. On July 14, 1969, an order was entered by the Honorable Clement F. Haynsworth, Jr., Chief Judge, United States Court of Appeals for the Fourth Circuit, dismissing plaintiff's appeal from the interlocutory order of the District Court denying her motion for jury trial.

15. On October 16, 1969, the plaintiff apparently filed a "Notice of Appeal" to the Supreme Court of the United States. (Neither the defendant nor his counsel were served with a copy of said document.)

16. On or about November 12, 1969, the defendant was served by mail with an "Amended Notice of Appeal to the Supreme Court of the United States." Thereafter the defendant was advised by the office of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, by letter dated November 26, 1969, that Plaintiff's notice of appeal had been returned to her on November 24, 1969, "for the reason that such notice is not filed in this Court."

17. On or about December 12, 1969, the defendant was served with a copy of plaintiff's printed "Petition For A Writ of Certiorari."

DISCUSSION

The respondent respectfully submits that the plaintiff's petition for writ of certiorari should be denied, for the following reasons:

First, there is no statutory authority which would permit the plaintiff to seek direct review by the Supreme Court of the United States, either by appeal or certiorari, of an interlocutory order of a District Court in a civil case denying a motion for jury trial under Rule 39(b) of the Federal Rules of Civil Procedure. It is assumed that what petitioner is attempting here is a review by the Supreme Court of the order of the Fourth Circuit Court of Appeals dismissing her purported appeal to that Court.

Second, the order from which the petitioner attempted to appeal to the Fourth Circuit Court of Appeals was an

interlocutory order, and not appealable under the provisions of Title 28 of the United States Code, Section 1254.

Third, neither plaintiff's "Notice of Appeal to the Supreme Court of the United States" nor her "Petition For A Writ of Certiorari" were filed within the time prescribed by Rule 11(3) or Rule 22(3) of the Supreme Court Rules. The order of the Fourth Circuit Court of Appeals dismissing plaintiff's appeal to that Court was filed on July 14, 1969. The plaintiff's "Notice of Appeal to the Supreme Court of the United States" was filed on October 16, 1969. Plaintiff's "Petition For A Writ of Certiorari" was filed on or about December 12, 1969. Neither of these documents were filed within the time allowed by Title 28 of the United States Code, Section 2101(c), which provides that an appeal or petition for a writ of certiorari intending to bring a matter of this nature before the Supreme Court of the United States for review must be taken or applied for within ninety (90) days after the entry of the judgment or decree which is sought to be reviewed.

Fourth, Rule 38(b) of the Federal Rules of Civil Procedure gives a party *a right* to trial by jury *only if jury trial is demanded not later than ten (10) days after the service of the last pleading.* Rule 38(d) of the Federal Rules of Civil Procedure provides that the failure of the party to request a jury trial as provided by Rule 38 constitutes a *waiver* by him of his right to trial by jury. The granting or denying of a jury trial thereafter is entirely within the discretion of the Court. In the present case, the District Court, in the exercise of its discretion, did not deem it advisable to grant plaintiff's request for a jury trial at the time of the final pre-trial conference, some two years after the institution of the action.

Fifth, the plaintiff's petition for a writ of certiorari is frivolous, without merit, improper, and should be denied.

CONCLUSION

The defendant respectfully prays this Honorable Court to deny plaintiff's petition, and to allow this case to proceed to disposition on the merits in the District Court.

Respectfully submitted,

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J. ROBERT ELSTER

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Civil Action C-179-WS-67

NEETA WEBB

VS.

ROBERT E. NOLAN, M.D.

ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned at final pre-trial conference on April 11, 1969 and the plaintiff having moved for trial by jury of all issues of fact in this action and the Court having heard the arguments of the plaintiff in support of her motion and the Court being of the opinion that the motion should be denied;

NOW, THEREFORE, it is hereby ORDERED that the plaintiff's motion for jury trial in this cause be and the same is hereby denied.

This 17 day of April, 1969.

/s/ EUGENE A. GORDON
United States District Judge